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No. 87-750

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

ERNESTO SERIO PAMPIN LOPEZ, Individually and as Administrator of the Estate of his Deceased Mother, SARA E. LOPEZ DE PAMPIN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Pan Am's petition [1] urges this Court to review two rulings of the court below—one holding that the doctrine of *forum non conveniens* may not be invoked unless all defendants are amenable to suit abroad; the other holding that an air carrier may not invoke international limitations on liability if it provides advice of those limits in type smaller than 10 point. At the request of this Court, the respondents-plaintiffs filed their brief in

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[1] The companies and organizations Pan American World Airways, Inc. ("Pan Am") is required to list in compliance with Rule 28.1 of the Rules of this Court are set forth on page (i) of Pan Am's petition.

opposition on January 20, 1988, and the respondent United States, a defendant below, filed its brief on March 11, 1988.[2]

1. *Forum Non Conveniens.* The Government agrees with Petitioner that the threshold rule adopted by the Fifth Circuit—*all* defendants must be available in the foreign forum—is wrong. The Government would, however, defer review until a later case because a better vehicle may come along. (Gov't Br. p. 10.) That view underestimates the importance of promptly correcting the Fifth Circuit's ruling. That ruling was unanimously adopted by fifteen judges[3] sitting *en banc.* The court's well-developed opinion is likely to serve as a primer for *forum non conveniens* decisions. The Fifth Circuit's rule, moreover, operates only to deny—not to grant—motions to dismiss; thus, obtaining review of the rule in other cases will be difficult unless *forum non conveniens* rulings, contrary to prevailing law, are recognized to be collateral orders that are subject to prompt interlocutory review.[4]

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[2] While our petition has been pending, this Court has received a petition and response in *Chan* v. *Korean Air Lines Ltd.*, *("KAL")*, No. 87-1055 (Dec. 23, 1987). The decision below in *KAL* formed part of the conflict that supports review of the second question presented here by Pan Am.

[3] We count Judge Higgenbotham in the majority. Conceivably, he could be treated as having abstained since he dissented from the *en banc* court's ruling that under *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), federal law, not state law, supplies the correct standard for *forum non conveniens* decisions. (App. 68a-80a.) This Court has previously left the *Erie* question open. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 248 n.13 (1981) citing, *inter alia*, *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 509 (1947).

[4] This Court is presently considering whether a district court's denial of a *forum non conveniens* motion can be appealed as a collateral order under the doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). See *Van Cauwenberghe* v. *Biard*, *cert. granted*, No. 87-336 (Nov. 9, 1987).

The Solicitor General's conclusion that this case is "not an appropriate vehicle" (Gov't Br. p. 10) rests on his notion that the ultimate result would be the same even if the trial court or the court of appeals were to apply the correct analysis on remand from this Court. The fifteen judges, however, did not indicate that the result reached by the *en banc* court would be the same if the factors set out in *Gilbert* and *Reyno* were assiduously applied. Even though (a) the panel had tried to decide the case on the basis of the *Gilbert* and *Reyno* factors and (b) the parties had fully briefed the factors to the *en banc* court, the *en banc* court affirmed solely on the basis of the "all or none" requirement. The Solicitor General's prediction about the ultimate outcome is impeached by the fact that the *en banc* court, in a carefully considered opinion, unanimously rested on a new ground and did not take the path that the Solicitor General now suggests would readily produce the same results.[5]

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[5] The Government asserts that no "'clear abuse of discretion' occurred in this case where the lawsuit was brought where the accident occurred." (Br. pp. 10-11.) That assertion significantly overstates the importance of the crash site. The United States fails to come to grips with the fact that, in a wrongful death case when liability is not contested, the evidentiary inquiry changes from how the accident happened to how much the decedent and his or her relatives lost. The accident site is not particularly significant in resolving the damages issues unless the site also happens to be the domicile or residence of the decedent or his or her family. Moreover, when, as here, priority is given to the accident site, the defendant (but not the plaintiff) has difficulty obtaining access to proof and conducting discovery respecting the only issue in the case—damages.

The fact that the foreign plaintiffs swiftly bring suit at the United States accident site before the carrier announces that it will not contest liability is equally insignificant. Here, the plaintiffs filed their complaints just one month after the crash. Plaintiffs in such cases may reasonably expect that liability issues will not be contested. See, *e.g.*, decisions listed in Pet. at 12-13 nn.17 & 13. Judge Gee's dissent in the instant case points out (Pet. App. 52a

The plaintiffs-respondents state (Br. 5, 7) that even if Pan Am ultimately prevails on *forum non conveniens* grounds, respondents can execute on their judgments against the United States and thereby moot the issues presented. We disagree with respondents' premise.[6] In addition, their conclusion is in error since, even if plaintiffs could execute against the Government, the controversy between Pan Am and plaintiffs would remain. The judgments against Pan Am would require it to pay approximately $127,900 in prejudgment interest.[7] That is

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n.1) that "[i]n aircrash disasters, as a rule, the defendant airline concedes liability. (Pan American notes that the last reported mass aircrash disaster case in which liability was contested was nine years ago. *In re Air Crash at John F. Kennedy International Airport*, 479 F. Supp. 1118, 1120-21 (E.D.N.Y. 1978).)"

[6] The plaintiffs-respondents assume that the United States is now foreclosed from having the judgments against it vacated if Pan Am prevails on the *forum non conveniens* issue. Contrary to plaintiffs' understanding of the record, the United States and Pan Am appealed from the judgments and both argued in their joint briefs that the *forum non conveniens* ruling was erroneous. The Solicitor General states that the government "did not address the *forum non conveniens* issue in the court of appeals at either the panel or the en banc proceeding." (Gov't Br. p. 12 n.15.) We disagree with his interpretation of the joint briefs filed before the panel, in which the argument for reversal was presented on behalf of the "defendants," *i.e.*, Pan Am and the United States, who were the only defendants left in the case by the time their joint notices of appeal were filed. Brief of Appellants Pan Am and the United States in No. 84-3833 at 9, 16, 22, 24, 26, 71-72 and in No. 84-3832 at 9 & 11 (incorporating the arguments made in the brief in No. 84-3833). The United States was not in any event required to present an argument that was "vigorously asserted" by another party and addressed by the court of appeals (*O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773, 783 n.14 (1980)), to seek rehearing in the court of appeals (see S.Ct. Rule 20.4) or to petition for certiorari in this Court (*O'Bannon*, 447 U.S. at 783 n.14), to preserve its ability to challenge the judgments against it.

[7] Under Louisiana law, prejudgment interest at times relevant here accumulated at the rate of 12% per year from the date of demand until the date of judgment. La. Civ. Code Art. 2924 B(2)(c)

almost one-fourth of the amount of the judgments for plaintiffs. The judgments against the United States do not—and cannot—provide for prejudgment interest. (App. at 96a; see also 28 U.S.C. § 2674.)

2. *Warsaw/Montreal.* The Government agrees in principle that the issue respecting the Warsaw and Montreal limits on liability warrants review by this Court. In suggesting that such review be made in the *KAL* case, No. 87-1055, the Government erroneously states that applying these limitations in Pan Am's case would not have "a practical impact on the amount of damages ultimately paid by the parties." (Gov't Br. p. 16.) In fact, if the Warsaw/Montreal limitations apply here, the amount of prejudgment interest Pan Am would owe would be reduced from approximately $127,900 (see n.7) to approximately $76,000—a savings of about $51,900.[8] For the reasons set out in our petition and the Government's response, this second question should be reviewed.

(1984). Approximately two years lapsed between the filing of the complaints and the date the district court entered judgment.

Our estimate of the prejudgment interest ($127,900) assumes that the remittiturs ordered by the court of appeals are accepted. If the families accept the court of appeals' remittiturs, these judgments would be reduced to $364,353.89 (for the Pampin-Lopez family) and $168,530.00 (for the Trivelloni-Lorenzi family). Two years at 12% each produces the total above.

[8] If the Warsaw/Montreal limit were applied here, the judgments against Pan Am, prior to the addition of interest, would be approximately $165,000 in the *Pampin-Lopez* case and approximately $150,000 in the *Trivelloni-Lorenzi* case. Under the Fifth Circuit rule, prejudgment interest would be assessed on these amounts. *Mahfoud* v. *Eastern Air Lines, Inc.*, 729 F.2d 777 (5th Cir. 1984), *aff'd by an equally divided Court*, 474 U.S. 213 (1985). At 12% per year for two years on these amounts, Pan Am would owe approximately $76,000 in prejudgment interest instead of about $127,900.

CONCLUSION

For the reasons presented in the petition, this Court should review the *forum non conveniens* and the Warsaw/Montreal issues.

Respectfully submitted,

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